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No. 04-52

IN THE

Supreme Court of the United States

BERTRAM RICE, Warden, et al.,

Petitioners,

vs.

STEVEN MARTELL COLLINS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

KENT S. SCHEIDEGGER
CHARLES L. HOBSON
Counsel of Record
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

QUESTIONS PRESENTED

1) What is the appropriate level of deference for a reviewing court to give the trial court's finding in a *Batson* hearing that the prosecutor's explanation for peremptory challenge is credible?

2) How does the deference standard for trial court decisions in *Batson* relate to the deference standards found in 28 U. S. C. §§ 2254(d)(2) and (e)(1)?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Batson v. *Kentucky* can create considerable pressure on the peremptory challenge and the criminal justice system, which excessive federal habeas scrutiny can only exacerbate. *Batson* and the Antiterrorism and Effective Death Penalty Act of 1996

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

both carry substantial protections for state criminal justice systems in the form of deferential standards of review. The Ninth Circuit's decision in the present case effectively ignored or eviscerated these standards, which is contrary to the interests of justice and society that the CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Collins was convicted by a jury of possession of rock cocaine. See *People* v. *Collins*, No. B106939 (Cal. App., Dec. 12, 1997), App. to Pet. for Cert. 109; Cal. Health & Safety Code § 11350(a). The jury also found that he had two prior serious or violent felony convictions, and he was sentenced to 25 years to life under California's "three strikes" law. App. to Pet. for Cert. 109-110. At a traffic stop, a police officer discovered that Collins had an outstanding arrest warrant, and the officer then found the cocaine on Collins in a search incident to the arrest. See *id.*, at 110. Collins moved to strike his prior convictions in the interests of justice, but the trial court denied the motion, noting that he had been almost continuously in prison or on parole since 1982. See *id.*, at 111-112.

Collins also moved that prosecutor exercised his peremptory challenges in a discriminatory manner against black prospective jurors. *Id.*, at 112-113.[2] The motion was made

2. The motion was made under the California Supreme Court decision banning discriminatory peremptory challenges, *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978), rather than *Batson* v. *Kentucky*, 476 U. S. 79 (1986). See App. to Pet. for Cert. 112. California courts have applied *Wheeler* in a manner that has since been disapproved by this Court as to *Batson*'s first stage. See *Johnson* v. *California*, 545 U. S. __, 162 L. Ed. 2d 129, 138, 125 S. Ct. 2410, 2416 (2005). Since the trial court found that Collins had proven a prima facie case of discrimination and required the prosecution to justify the challenges, and ruled on whether they were discriminatory, see App. to Pet. for Cert. 113-114, any error at *Batson*'s first stage is moot. See *Hernandez* v. *New York*, 500 U. S. 352, 359 (1991) (plurality). There is no claim that the California procedure is inconsistent with *Batson*'s second and third stages. Therefore, *amicus* will refer to Collins' motion as a *Batson* motion.

after the prosecution exercised peremptory challenges against two black prospective jurors, numbers 016 and 019. See *id.*, at 113. The trial court found that a prima facie case had been made and asked the prosecutor to justify the challenges.

> "The prosecutor responded both prospective jurors were 'young and I was con[c]erned with them being too tolerant for this type of case. [¶] Also, Ms. 016 made a remar[k] when the judge made a response to her comment "Uh-huh," she turned away and rolled her eyes. [¶] I don't think you asked her specifically to give a yes or no, but she went "yes" and rolled her eyes and turned away from the court. [¶] She and Mr. 006 [another prospective juror the prosecutor had excused] were both single, no ties.'
>
> "As to prospective juror no. 019 the prosecutor stated, 'she also had a daughter having a drug problem and sh[e] talked about not knowing much about what drug it was, things like that. She was not sufficiently educated in some areas to decide a case like this. But it is beyond any of her experience.' " *Ibid.*

The prosecutor also noted that two black jurors remained on the panel. *Ibid.* The trial court denied Collins' motion, holding that it was satisfied with the explanation for juror 019, namely the family drug problem and while it did not personally observe the demeanor of juror 016, "[t]he court is prepared to give the district attorney the benefit of the doubt . . . ." *Id.*, at 113-114.

Collins appealed his conviction and sentence. The California Court of Appeal applied California precedent that the prosecution's use of peremptory challenges is presumptively constitutional, and that it gave "great deference to the trial court in distinguishing bona fide reasons from sham excuses." *Id.*, at 115. The California Court of Appeal upheld the trial court's

denial of the *Wheeler* motion, see *id.*, at 116-117, and affirmed Collins' conviction and sentence. See *id.*, at 119-120. The California Supreme Court denied Collins' petitions for review and habeas corpus. See *Collins* v. *Rice*, 365 F. 3d 667, 673 (CA9 2004).

Collins filed a federal habeas petition, which was denied by the District Court. See App. to Pet. for Cert. 93-94. The Ninth Circuit reversed. It held that a finding of no discrimination under *Batson* was an issue of fact to be reviewed under 28 U. S. C. §§ 2254(d)(2) and (e)(1). See *Collins* v. *Rice*, 365 F. 3d, at 677. The Ninth Circuit found no error in the California Court of Appeal's decision with respect to *Batson*'s second stage, see *id.*, at 678, but came to a different conclusion with regard to the ultimate outcome of the case.

The Ninth Circuit found the decision of the California Court of Appeal to uphold the finding of no jury discrimination to be objectively unreasonable. See *Collins*, 365 F. 3d, at 673. It examined the record and found reasons to contradict the prosecution's justifications for challenging juror 016, utilizing very detailed factual analysis. See *id.*, at 679-685. The court also concluded that upholding the trial court's ruling that the prosecutor was credible was an "unreasonable determination of the facts because the prosecutor failed to offer any credible justification for striking juror 016." *Id.*, at 683. It then held that Collins met the "heavy burden" of proving by clear and convincing evidence error under § 2254(e)(1). See *id.*, at 685.

This Court granted certiorari on June 28, 2005.

SUMMARY OF ARGUMENT

Although necessary to the Constitution's guarantee of equal protection under the law, *Batson* v. *Kentucky* creates several problems for the criminal justice system. Because it requires courts to determine the subjective intent of the person making the peremptory challenge, it is difficult to administer. Also,

there is an inherent tension between the peremptory challenge and *Batson*'s requirement that counsel justify the challenge. Finally, *Batson* operates like the Fourth Amendment's exclusionary rule or *Miranda*, reversing convictions obtained from otherwise fair trials in order to advance other interests of society. This places a premium on accurate analysis of *Batson* hearings on appeal.

The best solution to these problems is to delegate most of the authority for *Batson*'s enforcement to the trial court. The focus of the *Batson* hearing is the prosecutor's justification for the peremptory challenge, which is primarily a credibility question. Since the trial court is in a much better position to judge counsel's credibility than any reviewing court, it makes sense to defer to the trial court's evaluation, which was done in *Hernandez* v. *New York*. Applied properly, *Hernandez*'s clear error standard will eliminate most of the work of appellate and habeas courts for denials of claims at *Batson*'s third stage. While third-stage post-trial reversals are possible, reversal will require unusual circumstances such as those found in *Miller-El* v. *Dretke*.

The Ninth Circuit did not accord the proper deference to the trial court's ruling. A federal habeas court's analysis of the California Court of Appeal's decision is made under the § 2254(d)(2) standard. That analysis determines whether the state appellate court reasonably applied *Hernandez*'s deferential standard to the trial court's decision. Throughout this process, any fact found by any state court is presumed correct under § 2254(e)(2).

The California Court of Appeal's decision is not only reasonable under § 2254(d)(2), it is also correct. Although this Court usually does not analyze the correctness of a state court ruling under § 2254(d), "right" is by definition reasonable. The trial court's conclusion that the prosecutor did not intend to discriminate was not clearly erroneous. The reasons given for the challenges were facially neutral. Under the circumstances

of the case, believing that the prosecutor was credible was a permissible interpretation of the evidence at hand.

ARGUMENT

I. The trial court is *Batson*'s gatekeeper.

A. Batson's Problems.

1. Subjectivity.

Batson v. *Kentucky*, 476 U. S. 79 (1986) is an unusual decision. While this Court had long held that racial discrimination in jury selection violated the Equal Protection Clause, see *id.*, at 84, and n. 3, *Batson* substantially changed the scope of the inquiry. Prior jury discrimination decisions typically addressed relatively overt forms of discrimination. The first jury discrimination case addressed a law that explicitly limited jury service to whites. See *Strauder* v. *West Virginia*, 100 U. S. 303, 305 (1880). Other cases also involved similarly obvious discrimination. See, *e.g.*, *Pierre* v. *Louisiana*, 306 U. S. 354, 355 (1939) (no blacks on venire even though one-third of the population); *Avery* v. *Georgia*, 345 U. S. 559, 560-561 (1953) (no blacks on venire, venire drawn from tickets in a box with whites and blacks assigned different colored tickets); *Vasquez* v. *Hillery*, 474 U. S. 254, 258-259 (1986) (no blacks on grand jury in the history of the county). Similarly, this Court's first effort to regulate discriminatory peremptory challenges was limited to systematic discrimination over many trials, rather than the use of peremptories at a single trial that demonstrate a clear pattern of discrimination. See *Swain* v. *Alabama*, 380 U. S. 202, 222-223 (1965).

The *Batson* Court recognized that *Swain* was insufficient to combat discriminatory peremptory challenges. That decision created an unacceptably "crippling burden of proof" which compromised efforts to prevent discriminatory peremptory challenges. See 476 U. S., at 92. While *Batson* provides more

protection for equal protection rights than *Swain*, it raises a new set of problems for the courts.

Batson differs most from *Swain* by allowing discrimination to be inferred from much less overt conduct. Instead of requiring repeated discrimination over several cases, discrimination can be proven simply from the prosecution's exercise of peremptory challenges at trial. *Batson*, 476 U. S., at 96. Direct evidence of discrimination is not necessary to make a prima facie case under *Batson*. Instead, the defendant can rely on the fact "that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate' " *Ibid.* (quoting *Avery* v. *Georgia*, 345 U. S., at 362). The defense may use this and any other relevant circumstances "to raise an inference" of discrimination. See *ibid.*

Batson considerably expanded the definition of what was jury discrimination, and substantially eased its proof. For example, the defendant does not have to prove discrimination by a preponderance of the evidence in order to establish a prima facie case. *Johnson* v. *California*, 545 U. S. __, 162 L. Ed. 2d 129, 138, 125 S. Ct. 2410, 2416 (2005). The fact that a minority actually serves on the jury does not necessarily prevent a prima facie case or a successful *Batson* claim. See *Miller-El* v. *Dretke*, 545 U. S. __, 162 L. Ed. 2d 196, 214, 125 S. Ct. 2317, 2325 (2005) ("*Miller-El II*"). Compared to *Swain*'s high standard, *Batson* considerably expanded the avenue for raising equal protection claims.

Attorneys are now much more likely to have to justify the exercise of peremptory challenges in court. This raises the inevitable problem of forcing counsel to explain that which is not meant to be explained. Peremptory challenges are not supposed to be capable of ready rationalization. At common law, peremptory challenges were labeled as "an arbitrary and capricious species of challenge . . . ." 4 W. Blackstone, Commentaries 346 (1st ed. 1769). Similarly, it has been described as the right to "peremptorily challenge 'on his own

dislike without showing any cause'; [the defendant] may exercise that right without reason or for no reason, arbitrarily and capriciously." *Pointer* v. *United States*, 151 U. S. 396, 408 (1894) (quoting 1 E. Coke, Institutes 156b (19th ed. 1832)).

The peremptory challenge has not changed. "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." *Swain*, 380 U. S., at 220. Jury selection is more art than science, and the psychology of bias is at best inexact. While *voir dire* can help provide a foundation for uncovering bias in some cases, effective use of the peremptory challenge often hinges on rationales that cannot be explained with any precision. "Indeed, often a reason for it cannot be stated, for a trial lawyer's judgments about a juror's sympathies are sometimes based on experienced hunches and educated guesses, derived from a juror's responses at voir dire or a juror's ' "bare looks and gestures." ' " *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 148 (1994) (O'Connor, J., concurring) (quoting *Swain*, *supra*, at 220). The fact that a challenge is based on a hunch does not make it a pretext for discrimination. Nonverbal cues can reveal a juror's attitude as much as verbal responses. See V. Starr & M. McCormick, Jury Selection 445-446 (3d ed. 2001). "Our belief that experienced lawyers will often correctly intuit which jurors are likely to be the least sympathetic, and our understanding that the lawyer will often be unable to explain the intuition, are the very reason we cherish the peremptory challenge." *J. E. B.*, *supra*, at 148 (O'Connor, J., concurring).

Once a prima facie case is made, *Batson* requires an inquiry into the motives of the attorney making the challenge. Courts must determine whether the peremptory challenge was motivated by a discriminatory purpose, an inquiry that contains "inherent uncertainty." See *Johnson*, 162 L. Ed. 2d, at 140, 125 S. Ct., at 2418. The uncertainty stems from the need to ascertain often difficult to articulate motives. "Intent is a subjective state, illusory and difficult to establish in absence of

voluntary confession." *Knauer* v. *United States*, 328 U. S. 654, 659 (1946). The difficulty of determining motive, intent, or other subjective belief is reflected in the rejection of these factors in other areas such as the Fourth Amendment, see *Whren* v. *United States*, 517 U. S. 806, 812-813 (1996), or *Miranda* v. *Arizona*, 384 U. S. 436 (1966). See *New York* v. *Quarles*, 467 U. S. 649, 656 (1984). "In general, 'we believe that "sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources." ' " *Missouri* v. *Seibert*, 542 U. S. 600, 159 L. Ed. 2d 643, 664, 124 S. Ct. 2601, 2618 (2004) (O'Connor, J., concurring) (quoting *United States* v. *Leon*, 486 U. S. 897, 922, n. 23 (1984), in turn quoting *Massachusetts* v. *Painten*, 389 U. S. 560, 565 (1968) (*per curiam*) (White, J., dissenting)).

Unlike other parts of the law, subjective intent is a necessary part of equal protection analysis. See *Whren*, 517 U. S., at 813. The fact that the Constitution requires this type of inquiry does not lessen its difficulty. This problem is compounded by the tension between the peremptory challenge and the need for its justification under *Batson*. Peremptory challenges are vulnerable to explanation. Since it is their nature not to have readily articulated reasons for their exercise, requiring too many reasons may undercut peremptory challenges, destroying their utility. "But, as we add, layer by layer, additional constitutional restraints on the use of the peremptory, we force lawyers to articulate what we know is often inarticulable." *J. E. B.*, 511 U. S., at 148 (O'Connor, J., concurring).

2. Windfall.

Another difficulty with *Batson* is the apparent windfall that it can give to some lucky criminal defendants. While *Batson* protects essential constitutional values, it is no less true that it has less to do with preserving the fairness or accuracy of the trial than with advancing other values. Although the petit jury must be drawn from a pool that is a fair cross section of the

community, see *Taylor* v. *Louisiana*, 419 U. S. 522, 530 (1975), there is no right to have the petit jury itself be similarly representative. See *Holland* v. *Illinois*, 493 U. S. 474, 478 (1990). Although the exclusion of a juror because of his or her race tends to rob the trial of the appearance of fairness and saps public confidence in the judicial system, *Batson* is premised on the principle that one's race is irrelevant to one's fitness as a juror. See 476 U. S., at 87 (quoting *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 223-224 (1946) (Frankfurter, J., concurring)); accord *Powers* v. *Ohio*, 499 U. S. 400, 410 (1991). Using race as a proxy for attitude or potential bias is contrary to the "dispassionate analysis" that is the hallmark of the law. *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614, 631 (1991). The race-based peremptory challenge "derives from open hostility or from some hidden and unarticulated fear . . . ." *Ibid.* While racially discriminatory challenges can compromise the fairness of the verdict in racially charged circumstances, in most cases *Batson* error does not prevent a jury from reaching an unbiased verdict.

Constitutional error is harmless in a criminal case if the prosecution can prove beyond a reasonable doubt that the error "did not contribute to the verdict obtained," *Chapman* v. *California*, 386 U. S. 18, 24 (1967). Since the particular racial composition of the jury is irrelevant to its verdict, *Batson* error would appear to meet the standard of harmlessness in most, if not all, cases. See Muller, Solving the *Batson* Paradox: Harmless Error, Jury Representation and the Sixth Amendment, 106 Yale L. J. 93, 118 (1996). This is incorrect, as *Batson* is structural error. However, it does highlight that appellate reversal of a conviction for *Batson* error provides a type of windfall to the defendant.

The defendant is more of an incidental beneficiary of the *Batson* rule. *Batson*'s breadth demonstrates that the real beneficiaries of its rule are society and jurors. A *Batson* claim can be raised even if the defendant and the potential juror are not of the same race. See *Powers* v. *Ohio*, 499 U. S., at 416.

Also, *Batson* applies to civil cases, see *Edmonson*, 500 U. S., at 616, and to challenges by criminal defense counsel. See *Georgia* v. *McCollum*, 505 U. S. 42, 59 (1992). While a *Batson* violation by the prosecution does some harm to the criminal defendant, see *Batson*, 476 U. S., at 86, it is difficult to quantify the damage. The damage to the excluded jurors and society from discriminatory peremptory challenges is much more tangible. It directly discriminates against the excluded juror, see *Batson*, *supra*, at 87, and has caused real damage to society. See *McCollum*, *supra*, at 49-50.

Since it is too expensive for an individual juror to enforce his or her equal protection rights through litigation, *Batson* allows the parties to protect the jurors' rights. See *id.*, at 56. This is similar to the Fourth Amendment exclusionary rule, which allows criminal defendants to protect Fourth Amendment rights that could not be protected through other remedies, see *Mapp* v. *Ohio*, 367 U. S. 643, 652-653 (1961), in spite of the cost to society of lost convictions. See *Nix* v. *Williams*, 467 U. S. 431, 447-448 (1984).

This system operates well at trial. A successful *Batson* motion at trial is not particularly costly to society, as the typical remedy is either to disallow the peremptory challenge and place the challenged person on the jury, or to dismiss the entire venire. See 5 W. LaFave, J. Israel, & N. King, Criminal Procedure § 22.3(d), p. 335 (2d ed. 1999). The real problem is with *Batson* reversals on appeal or habeas. While *Batson* error must lead to reversal, it often reverses the results of fair trials that led to the conviction of clearly guilty defendants. Since the prosecution has a very limited ability to appeal an improper refusal to grant a *Batson* motion against the defense, see *Smalis* v. *Pennsylvania*, 476 U. S. 140, 145-146 (1986) (cannot appeal acquittals), *Batson*'s unfairness is one-sided. While this is a cost society must bear in order to uphold the mandate of the Equal Protection Clause, the balance of equities should still influence post-trial review of *Batson* claims. Courts should make every effort to minimize inaccurate grants of *Batson*

claims on appellate review. Fortunately, there are already mechanisms in place that can minimize defendant windfalls, while protecting the equal protection interests of jurors and society. Unfortunately, the Ninth Circuit did not properly implement these procedures in this case.

B. The Trial Court Solution.

Batson's two problems, the difficulty in evaluating the prosecutor's justification for the challenge, and the need for accurate appellate review, are best addressed by delegating primary authority to the trial courts to determine whether the peremptory challenge was in fact motivated by an intent to discriminate. While there is a role for appellate and collateral review of *Batson* claims, it is necessarily small. The trial courts are the real guardians of *Batson*.

This role was assigned to the trial courts by the plurality in *Hernandez* v. *New York*, 500 U. S. 352 (1991). The plurality recognized that once a prima facie case of discrimination is made, *Batson* centers on the credibility of the prosecutor. In *Hernandez*, the defendant argued for " 'independent' " appellate review of a trial court's rejection of a *Batson* claim. *Id.*, at 366-367. This argument was rejected in language affirming the primacy of the trial court in *Batson* procedure. "But if an appellate court accepts a trial court's finding that a prosecutor's race-neutral explanation for his peremptory challenge should be believed, we fail to see how the appellate court nevertheless could find discrimination. *The credibility of the prosecutor's explanation goes to the heart of the equal protection analysis*, and once that has been settled there seems nothing left to review." *Id.*, at 367 (emphasis added).

Although the lead opinion in *Hernandez* was a plurality, the concurrence agreed with the plurality on the standard of deference for the trial court's findings at *Batson*'s third stage. See *id.*, at 372 (O'Connor, J., concurring) ("I agree with the plurality that we review for clear error the trial court's findings as to discriminatory intent, and agree with its analysis of this

issue"). The concurrence was the broader of the two opinions concurring in the result in *Hernandez*, holding that the plurality required too high a level of justification from the prosecutor, even though both the plurality and the concurrence upheld the peremptory challenges against the *Batson* challenge. See *id.*, at 375. Because the two opinions do not differ on the clear error standard, the plurality opinion can be taken as the definitive statement of the law.

Credibility is an issue best left to the trial courts. A question of credibility is "largely one of demeanor." *Patton* v. *Yount*, 467 U. S. 1025, 1038 (1984). The only court that can make this observation is the trial court, which gives its credibility determinations "special deference" from any reviewing court. See *Bose Corp.* v. *Consumers Union of the United States, Inc.*, 466 U. S. 485, 499-500 (1984). Therefore, even among the set of trial court rulings to which appellate courts must defer, credibility findings stand out as being particularly difficult to overturn. "The requirement that special deference be given to a trial judge's credibility determinations is itself a recognition of the broader proposition that the presumption of correctness that attaches to factual findings is stronger in some cases than in others." *Ibid.*

The *Hernandez* plurality's decision to give the same deference to the trial court's handling of the prosecutor's reasons for the peremptory challenges is the best way to address *Batson*'s problems. *Batson*'s problems center on the justification for the peremptory challenge. The requirement that the challenged peremptories must be justified gives *Batson* much of its subjectivity, see *supra* 8-9, and helps to foster the tension between *Batson* and the peremptory challenge. See Part I-A-1, *supra*. Since *Batson* is primarily a credibility question once the prima facie case is made, the case for relying on the trial court is further strengthened, making the trial court *Batson*'s gatekeeper.

Deferring to the trial court minimizes the risk of improper reversals on appeal. Given the importance of accurate appellate

implementation of *Batson*, see Part I-A-2, *supra*, this is particularly important. The *Hernandez* plurality's decision recognizes that the trial court has more means of determining the prosecutor's credibility than any reviewing court. See 500 U. S., at 365. It held that the trial court's factfinding on the issue of discriminatory intent will not be overturned unless it is "convinced that its determination was clearly erroneous." *Id.*, at 369. The plurality's approach was adopted by a majority of the Court. See *id.*, at 372 (O'Connor, J., concurring in the judgment). The *Batson* decision also recognized that the trial court was owed great deference, since *Batson* was primarily a credibility question. See 476 U. S., at 98, n. 21. Properly applied, the *Hernandez* standard substantially reduces the role of appellate and habeas courts in enforcing *Batson*. This will minimize *Batson*'s costs, while retaining its benefits.

C. Applying the Deference Standard.

The role of appellate and habeas courts in *Batson* is a function of when the *Batson* inquiry was terminated at trial. At *Batson*'s first step, the trial court will either reject or accept that the defense has established a prima facie case. If the trial court finds no prima facie case, then the defendant may appeal if convicted. There is less need for any special deference in this type of appeal, since the existence of a prima facie case does not involve any credibility questions. If the trial court finds a prima facie case and proceeds to *Batson*'s second and third stages, then the issue of the existence of a prima facie case is mooted. See *Hernandez*, 500 U. S., at 359 (plurality). *Batson*'s second stage, the prosecutor's explanation, see 476 U. S., at 97, should not generate any appellate or habeas review, because this stage is simply a precursor to the third. If the prosecution gives a race-neutral explanation, then the trial court must proceed to *Batson*'s third stage, see *id.*, at 98, but *Johnson* implies that the trial court must also proceed to the third stage even if the prosecution fails to provide a race-neutral explanation. See 162 L. Ed. 2d, at 140, n. 6, 125 S. Ct. 2410, 2417-2418, n. 6. *Batson*'s first two steps simply govern the production of evidence for *Batson*'s critical third stage. See *id.*, at 140, 162 L. Ed. 2d, at 2417-2418.

At *Batson*'s third stage there will be very limited review. If the trial court finds discrimination and grants the defendant's *Batson* motion, then the prosecution will generally have no effective appeal. A conviction moots any *Batson* error, while double jeopardy prevents appeal from an acquittal. See *Smalis*, 476 U. S., at 145-146. An interlocutory appeal or extraordinary writ might be available, but only at a major cost in trial delay. If the trial court rejects the *Batson* motion, then *Hernandez*'s deference standard substantially limits the scope of review.

The third stage resolves *Batson*'s key issue, whether the peremptory challenges were motivated by purposeful discrimination. See *Batson*, 476 U. S., at 98. This is usually decided by whether the trial court believes the prosecutor's reason for the peremptory challenge. See *id.*, at 98, n. 21 ("largely turn on evaluation of credibility"). If the trial court believes the prosecutor, then it will deny the *Batson* motion, and the deference standard will limit review to clear error. See *Hernandez*, 500 U. S., at 364-365 (plurality). It is possible that the *Batson* motion will fail even if the prosecutor gives an implausible reason. Since the defense carries the ultimate burden of proving discriminatory intent, failure to provide a plausible reason does not end the *Batson* inquiry at the second stage. See *Johnson*, 162 L. Ed. 2d, at 139-140, and n. 6, 125 S. Ct., at 2417-2418, and n. 6. However, since an insufficient reason for the peremptory challenge is evidence of discrimination, *Purkett* v. *Elem*, 514 U. S. 765, 767-768 (1995) (*per curiam*), it is very likely that a justification that is not believed by the trial court will lead to the *Batson* motion being granted. Since *Batson* will usually center on the credibility of the prosecutor's explanation, the trial court's decision is not likely to be overturned.

D. Batson and Diminished Review.

The fact that review of the trial court's resolution of *Batson* claims is diminished does not turn *Batson* into a dead letter. Appellate and habeas courts have ample opportunity to review dismissals of *Batson* claims for failing to make a prima facie case. See Part I-C, *supra*. While review of *Batson* denials is substantially limited, it is not completely foreclosed, as *Miller-El* v. *Dretke*, 545 U. S. __, 162 L. Ed. 2d 196, 125 S. Ct. 2317 (2005) demonstrates. Although *Miller-El II* shows that a trial's third stage ruling can be overturned, this does not diminish *Hernandez* as precedent. *Miller-El II* must be read in the context of its unusual facts.

Miller-El I. is unusual because the trial court's advantage in evaluating the peremptory challenges, relative to the appellate or habeas courts, was diminished. See K. Bowling, Note, *Miller-El* v. *Cockrell*: Procedural Rules to Protect Prisoners' Rights, 35 U. Toledo L. Rev. 723, 749 (2004). While Miller-El was tried before *Batson* was decided, *Batson* retroactively applied to his jury discrimination claim. See *Miller-El* v. *Cockrell*, 537 U. S. 322, 328 (2003) ("*Miller-El I*"). The Texas Court of Criminal Appeals remanded the case to the trial court for a *Batson* hearing that took place "a little over two years after [Miller-El's] jury had been empaneled." *Id.*, at 329. Therefore the trial court had some of the same problems with judging of the prosecution's reasons for the peremptory challenge credibility as the appellate and habeas courts. See *id.*, at 343.

Since the trial court had less special competency to make credibility findings, there was less need to defer to its conclusions. This Court relied on that fact in the *Miller-El II* decision, see 162 L. Ed. 2d, at 214, n. 1, 125 S. Ct., at 2326, n. 1, and interpretations of *Miller-El II* must be made in that context. Deprived of the most probative evidence of whether the prosecutor had discriminatory intent, the *Miller-El II* Court turned to other sources developed at the trial and in the habeas proceedings. These sources provided overwhelming evidence

of discriminatory intent. Comparative analysis, see *id.*, at 216-217, 125 S. Ct., at 2327-2328, the remarkable number of challenged black jurors, see *id.*, at 214, 125 S. Ct., at 2325, the lack of an adequate nondiscriminatory explanation for the challenges, see *id.*, at 2330-2332, 162 L. Ed. 2d, at 220, the use of certain tactics like shuffling the venire panel to remove black jurors, see *id.*, at 2332-2333, 162 L. Ed. 2d, at 222-223, the use of trickery to get disqualifying answers from black jurors, see *id.*, at 2337-2338, 162 L. Ed. 2d, at 226-227, and decades of jury discrimination by the Dallas District Attorney's Office, including an official handbook that contained articles advocating the systematic exclusion of blacks from Dallas juries, see *id.*, at 2338-2339, 162 L. Ed. 2d, at 228-229, made for an insurmountable case that the peremptory challenges were motivated by an intent to discriminate.

Given this evidence, and the absence of any contemporaneous evaluation of the credibility of the prosecutor's reasons for the challenges, Miller-El could satisfy the clear and convincing evidence standard necessary to establish his *Batson* claim on habeas in spite of the trial court's ruling to the contrary. See *id.*, at 2339, 162 L. Ed. 2d, at 229. While some parts of the evidentiary record were open to competing interpretations, "when this evidence on the issues raised is viewed cumulatively its direction is too powerful to conclude anything but discrimination." *Ibid.*

Fortunately, *Miller-El II*'s unusual facts should not be often repeated, since there should be few post-trial *Batson* hearings any more.[3] While less extreme circumstances could support overturning a trial court's rejection of a *Batson* claim, the evidence will have to be compelling to overturn a contemporaneous evaluation of the prosecution's discriminatory motive. This level of proof is not met in the present case.

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3. The one source of a significant number of post-trial *Batson* hearings is the disapproval of California's methodology in *Johnson*, *supra*, which will be retroactive to all cases pending on direct review.

II. The Ninth Circuit's opinion ignored the layers of deference owed to the trial court's finding that the peremptory challenges were not motivated by an intent to discriminate.

A. According Deference.

This case presents the interesting problem of how to treat a decision that is owed multiple layers of deference by the reviewing court. Since this case involves federal habeas review of a state conviction, the decision can only be overturned if the state court decision:

> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U. S. C. §§ 2254(d)(1), (2).

Batson v. *Kentucky*, 476 U. S. 79 (1986) is a fact-bound decision. The question of whether the peremptory challenge was the product of intentional discrimination usually revolves around the credibility of the prosecutor's reason for the challenge. See *supra*, at 12. Whether the prosecution intended to discriminate is thus a question of fact. See *Hernandez* v. *New York*, 500 U. S. 352, 367 (1991) (plurality); *Miller-El* v. *Cockrell*, 537 U. S. 322, 340 (2003) ("*Miller-El I*"). In addition to § 2254(d)(2)'s deference on facts, the trial court's decision with regard to the jury discrimination claim is also subject to the presumption of correctness of 28 U. S. C. § 2254(e)(1). See *Miller-El I*, *supra*, at 340.

While this situation was present in the second *Miller-El* case, see *Miller-El* v. *Dretke*, 545 U. S. __, 162 L. Ed. 2d 196, 125 S. Ct. 2137 (2005) ("*Miller-El II*"), that decision has limited relevance to the present case because of its unusual facts. Since the trial court did not make any credibility findings

until more than two years after the peremptory challenges were made, there was less reason to give any special credibility to its finding of no discrimination. See *supra*, at 16-17. In the present case, the trial court followed normal *Batson* procedure and made its decision after observing the prosecutor's reasons for the peremptory challenge. See *supra*, at 3-4. This is the classic *Batson* credibility finding, and it is subject to the clearly erroneous standard first announced in *Hernandez*. This Court will have to sort out these multiple levels of deference.

A qualified immunity decision provides a useful reference for sorting out more than one level of deference. *Saucier* v. *Katz*, 533 U. S. 194 (2001) addressed a case involving both the Fourth Amendment standard for excessive force in an arrest and the qualified immunity defense. See *id.*, at 197. The two concepts articulate very similar standards. The Fourth Amendment standard for excessive force is whether the use of force in that particular circumstance was objectively reasonable, see *id.*, at 201-202; *Graham* v. *Connor*, 490 U. S. 386, 396 (1989), and qualified immunity also relies on the objective reasonableness of the government official. See *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818-819 (1982); *Anderson* v. *Creighton*, 483 U. S. 635, 640-641 (1987). The Ninth Circuit found that the reasonableness inquiries of the standards were the same, since both evaluated the reasonableness of the officer's conduct. See *Katz* v. *United States*, 194 F. 3d 962, 968 (CA9 1999). It concluded that immunity would not be granted unless the court could find that as a matter of law that use of force was objectively reasonable. See *id.*, at 969.

This Court reversed. See *Saucier*, 533 U. S., at 197. A court cannot simply avoid qualified immunity, as the issue of immunity must be addressed at the earliest part of the litigation possible. See *id.*, at 200-201. While reasonableness marks the boundary of legal force under the Fourth Amendment, the vagueness of that definition means that police officers will occasionally make mistakes as to where the boundary lies. The immunity standard adds an additional buffer zone around the

Fourth Amendment limit. See *id.*, at 204-205. "The same analysis is applicable in excessive force cases [as other Fourth Amendment cases], where in addition to the deference officers receive on the underlying constitutional claim, qualified immunity can apply in the event the mistaken belief was reasonable." *Id.*, at 206.

Similar respect must be paid to the varying and multilayered standards of deference found in this case. Although there is much more difference between the terminology used in the *Hernandez* standard, § 2254(d)(2), and § 2254(e)(1), than the relatively small differences between qualified immunity and excessive force, this did not prevent the Ninth Circuit from failing to apply the proper deference to the trial court's decision. It effectively ignored the *Hernandez* standard of deference for the trial court's decisions under *Batson* and all but eviscerated the AEDPA's deference standards. Before these mistakes can be resolved, it is necessary to sort out the various deference standards and how they apply to this case.

B. Sorting the Standards.

1. The habeas provisions.

The first relationship to sort out is that among the habeas provisions. Section 2254(e)(1) is a relatively simple deference standard that protects facts found by state courts with a "presumption of correctness." The language chosen by Congress indicates an intent to give state court factfinding substantial protection from federal habeas courts. The use of the "clear and convincing" standard in 2254(e)(1) indicates that a strong presumption of correctness attaches to state court factfinding on federal habeas. If a fact is not at issue, then there is no need for (e)(1), but when the correctness of "a determination of a factual issue made by the state court" is questioned by petitioner or the habeas court, then (e)(1)'s presumption applies.

Section 2254(d)(2) also mixes concepts found in both (e)(1) and (d)(1). Like (e)(1), (d)(2) protects facts, yet like (d)(1), (d)(2) protects decisions through a reasonableness standard. Understanding this provision requires an examination of (d)(2)'s relationship to (d)(1) and (e)(1). First, it is necessary to sort out the differences between (d)(2) and (e)(1). The provisions differ in two ways. While (e)(1) protects factual issues determined in state court, (d)(2) addresses decisions based upon unreasonably determined facts. Also, (d)(2) contains a time component, "in light of the evidence presented in the State Court proceeding," that is not present in (e)(1). These differences allow the two provisions to operate separately.

Section 2254(d)(2) qualifies the general prohibition against the use of federal habeas to overturn state convictions found in § 2254(d). This qualification of 2254(d) is in turn qualified by § 2254(e)(1). While habeas relief will be granted for decisions based upon an unreasonable determination of the facts at hand, those facts are presumptively correct unless rebutted by clear and convincing evidence, limited to what was before the state court when it made its decision. This Court has noted that the two provisions operate together. See *Miller-El II*, 162 L. Ed. 2d, at 214, 125 S. Ct., at 2325. There is no reason to depart from this synthesis of the two standards.

This Court has not made any substantial effort to separate (d)(2) and (e)(1). When there is a problem with the state court's use of facts, this Court typically reads the two provisions in conjunction, summarily finding that habeas can be granted under these standards. See, *e.g.*, *Wiggins* v. *Smith*, 539 U. S. 510, 528 (2003); *Miller-El II*, 162 L. Ed. 2d, at 230, 125 S. Ct., at 2340. Also, this Court has found no reason to provide any additional explanation for what an "unreasonable determination of the facts" means other than simply applying the standard to the case before it. This parallels the treatment of (d)(1). In *Williams* v. *Taylor*, 529 U. S. 362 (2000), this Court held that "unreasonable application" meant objectively unrea-

sonable and did not mean incorrect. See *id.*, at 411. Other than that, this Court simply applied the standard to the case before it, just as it has done with (d)(2). Therefore, *amicus* will not attempt to provide any further explanation of (d)(2)'s standard.

The relationship between (d)(1) and (d)(2) is not particularly complicated. Where the facts are in dispute, (d)(2) is relevant. If not, then the conviction can only be overturned under (d)(1). See *Price* v. *Vincent*, 538 U. S. 634, 639-640 (2003). There is language that a state court's reliance on an unreasonable factfinding undermines the Court's faith in the reasonableness of the state court's decision under (d)(1), see *Wiggins*, 539 U. S., at 528, but the better practice is to keep the two standards separate. The present case is the type of case that (d)(2) is meant to address. It involves a finding that there was no discrimination at the third stage of the *Batson* inquiry. This is a question of fact that determines the outcome of the case, and is therefore best analyzed under (d)(2). Subdivision (d)(1) is better left for more purely legal issues under *Batson* such as whether the state court applied the appropriate test. See *Johnson* v. *California*, 545 U. S. __, 162 L. Ed. 2d 129, 125 S. Ct. 2410 (2005). Since this case only involves the trial court's finding at *Batson*'s third stage, (d)(2) and (e)(1) are the appropriate avenues for giving the conviction its proper deference.

2. Batson and habeas.

While (e)(1) and (d)(2) do protect fact-based decisions, *Batson* provides its own protection for a trial court finding that the peremptory challenge was not motivated by an intent to discriminate. *Batson*'s special deferential standard was mentioned in the habeas context in *Miller-El I*, 537 U. S., at 339-340. However, this Court did not apply it because the trial court conducted the *Batson* hearing two years after the trial. See *supra* at 16-17. If possible, *Batson*'s own standard of deference should not be lost in the mix of deferential standards that apply to habeas.

The *Miller-El I* Court noted the *Hernandez* deference standard "[i]n the context of direct review" and then also stated the deference due on habeas to state court judgments under §§ 2254(d)(2) and (e)(1). See 537 U. S., at 340. This distinction provides the key to harmonizing the various standards of deference. *Miller-El I* did not render *Hernandez* irrelevant to federal habeas. Rather, it reflected a subtle understanding of the different roles for *Hernandez* and § 2254, and how each constrains the federal habeas court.

When a federal habeas court examines the constitutionality of the petitioner's trial or sentence, it does not apply § 2254 directly to the trial court's actions. Instead, it looks to the reasonableness of the state court opinion affirming the conviction on direct or collateral review. See, *e.g.*, *Brown* v. *Payton*, 544 U. S. __, 161 L. Ed. 2d 334, 345, 125 S. Ct. 1432, 1439 (2005) (decision of California Supreme Court affirming sentence not unreasonable); *Price*, 538 U. S., at 639 (court of appeals improperly failed to apply § 2254(d) to the Michigan Supreme Court's opinion rejecting defendant's double jeopardy claim); *Wiggins*, 539 U. S., at 528 (Maryland Court of Appeals' decision unreasonable under §§ 2254(d)(1) and (d)(2)). Therefore, when this Court reviews the California Court of Appeal's denial of Collins' *Batson* claim, it applies § 2254(d)(2) to that decision. That review requires the federal habeas court to determine the objective reasonableness of the state appellate court's ruling that, under *Hernandez* or its equivalent, it could not overturn the trial court's decision to reject the jury discrimination.

Barring the unusual facts of *Miller-El II*, both *Hernandez* and § 2254 are relevant to federal habeas review of a *Batson* claim rejected at the third stage. The habeas court cannot grant relief unless it finds that the state appellate court was objectively unreasonable to hold that the trial court's finding of no discrimination was not clearly erroneous. The habeas court must also presume that every fact found in any of the state court proceedings is correct unless rebutted by clear and

convincing evidence. This high standard is inconsistent with the result reached by the Ninth Circuit.

C. Applying the Standards.

1. Right before reasonable.

In a federal habeas case, this Court usually applies § 2254's deferential standard rather than determining whether the state court decision was in fact correct. Since a state court decision can be incorrect but still reasonable under § 2254, a federal habeas court applying § 2254(d)(1) does not have to determine whether the state court's decision was correct. See *Williams*, 529 U. S., at 411. Since (d)(2) also has a reasonableness standard, it would normally apply in the same manner.

While a habeas decision does not generally require determining whether the state court decision was correct, § 2254(d) does not prevent a habeas court from holding that the state court decision was correct. If a state court decision is correct, then "it follows *a fortiori*" that it is not unreasonable or contrary to this Court's precedents, under § 2254(d)(1), see *Weeks* v. *Angelone*, 528 U. S. 225, 237 (2000), and § 2254(d)(2) should be no different.

Holding that the California Court of Appeal's decision affirming the conviction was correct rather than simply reasonable is the better option in this case. A finding that the state court decision is correct requires this Court to apply the *Hernandez* deference standard, while the reasonableness inquiry requires an examination of the *Hernandez* standard, the deferential standards of §§ 2254(d)(2) and (e)(1), and possibly § 2254(d)(1). The Ninth Circuit's decision demonstrates that the courts have problems appreciating *Hernandez*'s deference standard for the trial court's findings at *Batson*'s third stage and need more instruction from this Court.

Applying the *Hernandez* deference standard also advances many of the same interests protected by the AEDPA. Deference to a trial court's determination of jury bias is not just a

matter of deferring to the actor with the best information. It also advances finality by "preserv[ing] a trial court's integrity as a court of law, instead of as an 'entrance gate' for fact collecting subject to appellate review." *Wainwright* v. *Witt*, 469 U. S. 412, 428, n. 10 (1985). The *Witt* Court drew this from Judge Higginbottom's special concurrence in *O'Bryan* v. *Estelle*, 714 F. 2d 365, 392 (CA5 1983), calling it an artful discussion of the reasons for deferring to the trial court's decisions in that context. See 469 U. S., at 428, n. 10. The *Witt* Court also notes about Judge Higginbottom's concurrence that, "he points out that on habeas review, comity and federalism indicate the need to defer to the independent mechanisms of state government that already have reached one decision on the same facts." *Ibid.* As in the jury bias cases, the *Hernandez* standard protects comity, finality, and federalism, which are also the primary interests protected by the AEDPA. See *Duncan* v. *Walker*, 533 U. S. 167, 178 (2001).

2. Deference, credibility, and the trial court.

The trial court rejected Collins' *Batson* motion because it believed that the prosecutor's explanations for the peremptory challenges were credible. See App. to Pet. for Cert. 113-114 ("satisfied" with the explanation for juror 019 and "prepared to give the district attorney the benefit of the doubt as to" juror 016). Since the rejection of Collins' *Batson* motion turns on a credibility finding by the trial court, it can be reversed on appeal only if it is clearly erroneous. See *Hernandez*, 500 U. S., at 369 (plurality); *id.*, at 372 (O'Connor, J., concurring).

"We have said that '[w]here there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous.' " *Id.*, at 369 (quoting *Anderson* v. *Bessemer City*, 470 U. S. 564, 574 (1985)). The majority of the Ninth Circuit panel below ignored this standard. While it paid lip service to *Hernandez*, see *Collins*, 365 F. 3d, at 679, it invented an excuse to bypass that standard, claiming that "the basis for the state appellate court's determination was its

conclusion that there was 'nothing in the present record' to indicate that the trial court did not conduct a searching inquiry in giving the prosecutor the benefit of the doubt or should have questioned the prosecutor's credibility" which constituted an unreasonable determination of the facts. See *id.*, at 683. This justified the majority's exhaustive examination of the record to come up with its own judgment of the prosecutor's credibility from a cold record, years after the *Batson* motion had been made and denied.

That is not what was meant by *Hernandez*. The trial court's decision does not have to be the product of a searching inquiry or survive rigorous analysis by the Court of Appeal. If the trial court "took a permissible view of the evidence" then its acceptance of the prosecutor's reason for the peremptory challenge must be upheld under *Hernandez*. 500 U. S., at 369 (plurality).

The trial court's decision that there was no discrimination is a permissible view of the evidence. With respect to juror 016, the reasons given, youth, demeanor to a court's comment, and a lack of ties to the community, see App. to Pet. for Cert. 113, are all facially neutral reasons that would justify a peremptory challenge. The majority below places great emphasis on the fact that the prosecution referred to the youth of prospective juror 019, who was in fact a grandmother of five. According to the majority, this suggested that the prosecutor either was incapable of judging age or was intentionally deceptive. See *Collins*, 365 F. 3d, at 683. A far more plausible explanation is that this was a simple accident made during a discussion of jurors 016, 019, and the jurors subject to the *Batson* challenge, and juror 006, a young, single, and white juror. See *id.*, at 688 (Hall, J., dissenting). During the discussion, juror 016 was frequently mentioned in tandem with either juror 019 or juror 006. It is therefore likely that the prosecutor simply flipped the 6 and 19 at one point. Since defense counsel made a similar mistake, this is by far the more plausible explanation. See *ibid.*

The majority also attacked by the prosecutor's credibility because she invoked one impermissible reason—maintaining a proper gender balance—as a reason for challenging juror 016. See *id.*, at 684 (majority). While an implausible or impermissible explanation can be evidence of discriminatory intent, see *Purkett* v. *Elem*, 514 U. S. 765, 767-768 (1995), a single reference to an improper reason by the prosecutor does not automatically render the trial court's denial of a *Batson* motion clearly erroneous. Gender balance was only one of the several reasons for the challenge, and was not mentioned by the trial court as a reason for accepting the prosecution's explanation. See App. to Pet. for Cert. 113-114. This minor impropriety, which was properly rejected by the trial court, see *Collins*, 365 F. 3d, at 684, does not transform its decision into clear error.

The majority also attacked the credibility of the prosecutor's explanation that juror 016 was young and single and therefore may be more tolerant of rock cocaine. See *id.*, at 681. The prosecutors's explanation is certainly logical, and in the context of the case, race-neutral, since she applied a similar reason to challenge a white juror, juror 006. See *id.*, at 681, n. 10. The majority rejected this explanation, finding juror 006 distinguishable from juror 016 because juror 006 "had never been employed and, significantly, had an uncle who was a recovered alcoholic." *Ibid.* At that level of specificity, the prosecutor could never find a comparable white juror. The uncle's alcoholism is simply irrelevant to the comparison. Given the high incidence of alcoholism, it is not unusual for someone to have an alcoholic relative. Juror 006's unemployment simply magnifies the lack of ties that he has in common with juror 016. While this provides a somewhat stronger justification for a peremptory challenge, it is not so different that it invalidates the reason given for juror 016.

The unchallenged white juror given by the majority as closer to juror 016 illustrates the majority's attitude to the trial court. It notes that juror 015 "possessed the same objective characteristics as Juror 016: both were single, employed

females with no children who responded to the trial court's questions in the same manner, thereby revealing the pretextual nature of this justification." *Id.*, at 681. The majority fails to mention the key factor tying together the prosecution's no-ties analysis, juror 016's youth. Like juror 016, juror 006 was young, see *id.*, at 688 (Hall, J., dissenting), while juror 015's age is never mentioned. Lacking clear and convincing evidence to the contrary, it is more than permissible to believe that jurors 016 and 015 are distinguishable by age, and that juror 016 is more comparable to the challenged juror 006 rather than the unchallenged juror 015.

The majority also held that the fact that juror 016 thought that crack cocaine should be illegal, and that she knew no one who had a problem with drugs or alcohol, rendered the prosecutor's justification implausible. See *id.*, at 680-681. This is simply untenable. While juror 016 may not have displayed overt signs of extra tolerance for drug offenders, it is not impermissible to infer greater sympathy or tolerance for drug offenders from a person's youth. A young person with few ties to the community may be more willing to give a low level cocaine offender a second chance, particularly in a "three strikes" case involving a potential 25 years to life sentence.[4] The prosecution's justifications for challenging juror 016, and the trial court's acceptance of them, are much more permissible to infer from the evidence than the majority's unforgiving reading of the facts.

One of the reasons given by the prosecution for challenging juror 016 was her demeanor at *voir dire*. See *supra* at 3. Demeanor is a classically valid justification for a peremptory challenge, see *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127,

4. While California juries are not specifically informed that they have a three strikes case, there is always the possibility that they can infer the nature of the potential penalty from facts like those found in this case: the defendant was charged with multiple prior serious or violent felony convictions, and was being tried for a relatively minor felony. See App. to Pet. for Cert. 109-110.

148 (1994) (O'Connor, J., concurring), and uniquely within the province of the trial court. The trial court's acceptance of the prosecutor's explanation regarding juror 016's demeanor is a finding of fact that the explanation was credible. App. to Pet. for Cert. 113-114, 116-117. Even though the judge did not observe the same demeanor in the juror, the critical question is whether the prosecutor was sincere in her belief she had observed it and that this was a reason for the challenge. The trial judge's finding of fact on the prosecutor's credibility is entitled to very strong deference.

The majority below is undeterred by these factors. In spite of a cold record, read years after the trial, it held that the trial court's holding that the prosecutor's explanation was credible was clear error, and that the California Court of Appeal's holding to the contrary was objectively unreasonable. See *Collins*, 365 F. 3d, at 684. The reasons given for this startling conclusion, the prosecutor's mistake regarding juror 019's age, the gender rationale for challenging jurors 016 and 019, and the purportedly pretextual nature of the youth and lack of ties justification, see *ibid.*, cannot support this claim. As noted earlier, they are all much less plausible than an interpretation of the facts supporting the trial court's decision. *Hernandez* requires no more. The fact that two black jurors were left on the final jury, see *id.*, at 685, n. 14; App. to Pet. for Cert. 113, while not dispositive by itself, reinforces this conclusion.

The majority's approach is summed up in one footnote in the opinion contesting the trial court's recognition of juror 016's relative youth:

> "We further note that the record contains no information regarding Juror 016's age, save the trial court judge's statement that Juror 016 'was a youthful person, as was 006.' Although the trial court is certainly in the best position to view demeanor, credibility, and other intangibles in the courtroom, age is an objective fact that is not so easily discerned by appearance. Thus, the record fails to

establish just how old Juror 016 might have been." 365 F.3d, at 680, n. 8.

The majority below has replaced the deference standards of *Hernandez* and the AEDPA with one of contempt for the trial court's findings. While this misapplies the AEDPA, it also misconstrues *Batson*. The California Court of Appeal's decision is not merely reasonable. It is also right.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

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Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation